IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1162

JONES TRANSFER COMPANY, ET AL.
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., BRIEF IN OPPOSITION

William E. Kenworthy
Gerald W. Hess

4045 Pecos Street
Post Office Box 5746
Denver, Colorado 80217

Attorneys for Respondent,
Rocky Mountain Motor Tariff Bureau, Inc.

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ARGUMENT

Petitioners, Jones Transfer Company, et al., request this Court to issue its writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit which upheld new rules adopted by the Interstate Commerce Commission prescribing uniform rules and charges applicable to the detention of the equipment of motor common carriers. This action presented a routine review pursuant to the Administrative Procedure Act (5 U.S.C. Sec. 706) of the decisions reached by the I.C.C. in an informal rulemaking proceeding. In seeking the writ of certiorari, the Petitioners contend that: (1) The Court of Appeals for the Third Circuit erred in construing this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), in reviewing action taken by the Interstate Commerce Commission in the rulemaking proceeding entitled

Ex Parte No. MC-88, Detention of Motor Vehicles-Nationwide, 124 M.C.C. 680 (1976), 126 M.C.C. 803 (1977), and (2) that the Interstate Commerce Commission acted arbitrarily and capriciously in promulgating rules regulating the application of detention charges where use is made of holding areas provided by shippers or consignees.

I.
THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR REVIEW.

Review of the opinion of the Court of Appeals clearly reveals the erroneous nature of Petitioners' first contention that the Circuit Court did not understand the appropriate scope of review. In its opinion, the Court described its responsibility on judicial review (9a and 10a)[1] as follows:

> The starting point for judicial review of the ICC orders is 5 U.S.C. Section 706(2)(A): 'The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .' But we do not write on a clean slate in fashioning a construction of what is arbitrary and capricious in the context of reviewing ICC *rulemaking* functions. The Supreme Court has specifically and definitively addressed this aspect of statutory construction, and has formulated a scope and standard that severely limits the extent of judicial review:

The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co. v. United States*, 271 U.S. 268 (1926), and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases*, 274 U.S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the Commission's exercise of its rulemaking authority, on the one hand, and that governing its adjudicatory function, on the other:

> In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised

> by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general. *Assigned Car Cases*, *supra*, at 583.

United States v. Allegheny-Ludlum Steel Corporation, *supra*, 406 U.S. at 748-49.

Following this statement of the appropriate standard, the Court proceeded to find the Commission's findings and conclusions to be "rationally supported."

It is egregious to suggest that the Third Circuit did not understand and apply the standard explicitly stated in its opinion. While the language used in the opinion below might be construed as an expression of a preference for a somewhat broader standard of review, it is simply not evidence that the Circuit Court did not understand and apply the proper standard of review. Under the *Allegheny-Ludlum* standard, the Court found the I.C.C. order to represent a reasonable balancing of competing interests and policies.

Similarly, Petitioners' argument that the decision below conflicts with those made by other Circuit Courts who remanded specific agency decisions is specious. Those cases involved different subject matter, statutory provisions and records. They simply do not demonstrate by inference or otherwise that a conflict exists between the various circuit courts of appeals as to the proper standard of review of informal rulemaking provisions. The case of *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281, cited by Petitioners, did, in fact, involve reversal of a district court decision holding action by the I.C.C. to be arbitrary, capricious and an abuse of discretion. As the Court noted in that opinion, the scope of review under the "arbitrary and capricious" standard is a narrow one and the reviewing court is not empowered to substitute its judgment for that of the agency, 419 U.S. 285.

Neither Petitioners nor Respondents quarrel with the proposition that the unanimous opinion of this Court in *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, is the controlling authority on standard of review. Indeed, it is worth noting that it is a peculiarly appropriate precedent, involving, as did the proceeding below, a general informal rulemaking in which the Interstate Commerce Commission was concerned primarily with the resolution of policy matters of an essentially legislative character involving evaluation of problems particularly within the agency's knowledge and expertise related to the utilization of common carrier equipment. Judge Aldisert was particularly

well qualified to apply the *Allegheny-Ludlum* standard, having been involved in that case as well.

We do not believe it is unfair to suggest that Petitioners' attack on the standard of review applied by the Circuit Court amounts to little more than an attempt to bootstrap past the requirement of this Court's Rule 19 that they make a showing that "special and important reasons" exist for granting certiorari.

II.
THE DECISION OF THE INTERSTATE COMMERCE COMMISSION WAS NOT ARBITRARY AND CAPRICIOUS.

The second ground advanced to support Petitioners' request for grant of certiorari is that the decision of the Interstate Commerce Commission was arbitrary, capricious and an abuse of its discretion in regulating application of detention charges in situations in which use is made of a holding yard provided by the shipper or consignee. This ground essentially amounts to no more than a request that this Court again perform the function assigned to the Court of Appeals to review the administrative record to determine its adequacy in the hope it will be inclined to second guess the decision of the Court of Appeals. Ordinarily, certiorari will be denied to review the decision of the Court of Appeals involving a fair assessment of the record on the issue of substantiality of evidence, *N.L.R.B. vs. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 1978 (1938).

The issue of the use of holding yards or "bull pens" was the subject of discussion and argument by numerous participating parties including the major shipper, Ford Motor Company, in their initial submissions to the Commission. It was also the subject of a substantial number of petitions for reconsideration after the Commission adopted a proposed uniform detention rule in its initial Report and Order. These petitions were carefully evaluated by the Commission in its Report and Order on Reconsideration (136a-142a), and, as a result thereof, the Commission modified the rule to permit use of holding yards without liability for detention charges and to require the carrier to shuttle the trailer from a holding yard, when an unloaded trailer is placed in a holding yard for reasons of **carrier** convenience. As modified, the rule apparently met with acceptance from major segments of the shipping community, such as the meat packers, who argued that the rule in its initial form would have impaired the use of trailer spotting for the meat packing industry. The Commission, however, maintained those aspects of its rule which it found necessary to prevent preference and prejudice as between shippers.

The implication that the Commission's rule mandates higher cost and inefficient carrier operations or curtails the use of holding yards is not warranted and the contentions of Ford Motor Co. to this effect were repeatedly rejected by the Commission (139a). The only effect of the Commission's rule is to require shippers, rather than carriers, to bear "shuttle" and "detention" costs of

equipment in those situations where equipment is initially placed in holding yards essentially for the shipper's convenience. If holding yards proved to be economically and operationally efficient prior to adoption of the new regulations, they presumably will continue to be used hereafter. And, as the Commission noted in its Decision and Order decided September 14, 1977 (169a), there is no justification for forcing the carriers or linehaul rate structure to absorb and subsidize inefficient operations of large shippers.

CONCLUSION

For the foregoing reasons, the Peititon for Certiorari should be denied.

Respectfully submitted,

William E. Kenworthy
Gerald W. Hess

Attorneys for Respondent,
Rocky Mountain Motor Tariff
Bureau, Inc.

[1]References are to pages of Petitioners' joint appendix to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.